

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY M. SZKRYBALO, KEVIN M.
SZKRYBALO, KENNETH A. SZKRYBALO,
GREGORY A. SZKRYBALO, and ESTATE OF
HARRY A. SZKRYBALO,

UNPUBLISHED
May 31, 2007

Plaintiffs-Appellants,

ON REMAND

v

No. 269125
Wayne Circuit Court
LC No. 05-504675-CZ

JAMES SZKRYBALO and ANDREA
SZKRYBALO,

Defendants-Appellees.

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. On April 11, 2007, the Supreme Court issued an order reversing that portion of our September 21, 2006 opinion holding that the only evidence of a “badge of fraud” under MCL 566.34(2) in that case was that defendant James Szkrybalo transferred assets to his wife, Andrea, an “insider” under MCL 566.31(g)(i)(A). The Supreme Court found that plaintiffs presented evidence of several other badges of fraud and remanded the case for consideration of whether, in light of the above evidence, plaintiffs established a genuine issue of material fact regarding whether defendants actually intended to hinder, delay, or defraud plaintiffs under MCL 566.34.

Plaintiff, Jeffrey M. Szkrybalo, appealed as of right an order granting summary disposition to defendants, James Szkrybalo and Andrea Szkrybalo, in this action alleging a violation of the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.* After due consideration, we find that plaintiffs submitted sufficient evidence of actual fraud and that there thus exists a question of material fact as to whether James acted with actual intent to hinder, delay, or defraud. Accordingly, we reverse the trial court’s grant of summary disposition in defendants’ favor as to the actual fraud claim.

This action has its basis in James Szkrybalo’s (“James”) embezzlement of funds from the estate of Harry Szkrybalo. Due to James’ actions, a judgment was entered in favor of plaintiffs against James in the amount of \$268,669.86. Shortly after the judgment was entered, Andrea Szkrybalo purchased a home in her and her daughter’s names. In 2004, defendants refinanced

the home, executing mortgages for the same while, according to plaintiff, James failed to pay on the judgment entered against him. Plaintiffs contend James substantially contributed to the upkeep, mortgage payments and maintenance of the home, and that defendants thus acted with intent to hinder, delay, or defraud James Szkrybalo's creditors in purchasing/refinancing the home. Summary disposition was ultimately granted in favor of defendants pursuant to MCR 2.116(C)(10).

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). A motion made under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

On appeal, Jeffrey Szkrybalo (hereinafter "plaintiff") argued that the trial court erred in granting summary disposition to defendants and denying summary disposition to plaintiffs because plaintiffs submitted evidence of actual fraud with respect to the purchase of the home in Andrea Szkrybalo's name. We agree.

Fraud must be proved by clear and convincing evidence and must never be presumed. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996). But fraud may be established by circumstantial evidence. *Id.*, p 458. "In other words, fraudulent or wrongful conduct may be inferred from other evidence." *Id.*

MCL 566.34 provides in pertinent part:

- (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:
 - (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.
 - (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
 - (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
 - (ii) Intended to incur, or believed or reasonably should have believed that he or

she would incur, debts beyond his or her ability to pay as they became due.

MCL 566.34(2) enumerates several factors for determining whether there is actual intent to hinder, delay or defraud:

(2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:

- (a) The transfer or obligation was to an insider.
- (b) The debtor retained possession or control of the property transferred after the transfer.
- (c) The transfer or obligation was disclosed or concealed.
- (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (e) The transfer was of substantially all of the debtor's assets.
- (f) The debtor absconded.
- (g) The debtor removed or concealed assets.
- (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
- (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
- (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Actual intent to defraud may be inferred from the “badges of fraud” set forth above. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 659; 513 NW2d 441 (1994). *Id.* “These badges of fraud are not conclusive evidence, but may be strong or weak depending upon their nature and number occurring in the same case.” *Id.* at 659-660.

An initial issue when considering whether actual fraud has been shown is whether there was a transfer by James. Under the UFTA, a “[t]ransfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance.” MCL 566.31(l). From 2002 through 2005, James made numerous deposits of checks, ranging in value from tens of dollars to several thousands of dollars, into bank accounts at Independent Bank and Midwest Guaranty Bank. The Independent Bank account is in Andrea’s name, and the Midwest Guaranty Bank account is in the name of Andrea, or at least has Andrea’s name on the checks and deposit slips. Significantly, mortgage payments for the home were made through checks drawn on these accounts. Because James deposited large sums of money into bank accounts that were in Andrea’s name and mortgage payments were made using those accounts, we conclude that there were transfers by James to Andrea. In addition, James admitted in answers to interrogatories “THAT A PORTION OF SOME, BUT NOT ALL, OF THE NOTE PAYMENTS . . . WERE SUPPLIED BY ME.” (Emphasis in original.)

There being transfers, the issue becomes whether James made the transfers with actual intent to hinder, delay, or defraud any creditor. Considering the factors set forth in MCL 566.34(2), there is evidence of such an intent.

First, Andrea and defendants' daughter received title to the marital homestead. Thus, any contribution by James to its acquisition could be viewed as a transfer to insiders under MCL 566.34(2)(a). See MCL 566.31(g)(i)(A). Second, before the transfer was made, James had been sued and had an outstanding judgment against him. Third, the transfers occurred shortly before James incurred a substantial debt. Fourth, James did not receive a reasonably equivalent value for the transfers. Fifth, while James apparently indicated an inability to make payments on the judgment entered against him and indicated a relatively low income on income tax forms, it is undisputed that he deposited tens, if not hundreds of thousands of dollars into accounts held in his wife's name and that such funds which were used, at least in part, to assist in paying the mortgage payments. This could be construed as concealment of assets. Given that several of the badges of fraud were demonstrated, there exists a question of material fact as to whether James acted with actual intent to hinder, delay, or defraud and summary disposition based upon MCR 2.116(C)(10) was inappropriate.

Reversed as to the trial court's grant of summary disposition in defendant's favor on the actual fraud claim and remanded for proceedings consistent with this opinion, and affirmed in all other respects. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Michael R. Smolenski

/s/ Deborah A. Servitto